Supreme Court, U. S.
FILED
MAY 21 1976
MICHAEL RODAK, JR., CLERK

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1435

ZELDA DANNA PASCHALL, LOUISE GREEN HOYT, JOHN N. PASCHALL, JR., JAN PASCHALL HARDEN and FOURTH NATIONAL BANK AND TRUST COMPANY OF TULSA, OKLAHOMA,
Petitioners,

VERSUS

CHRISTIE-STEWART, INC., and
R. H. VAUGHN and R. W. GARRETT,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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May, 1976

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Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioners seek review by Writ of Certiorari of a Decision rendered by the Supreme Court of Oklahoma, pursuant to an opinion by this Honorable Court in Mary Louise Green Paschall, et al., vs. Christie-Stewart, Inc., et al., No. 72-922, which remanded the case to consider whether Petitioners had preserved the right to challenge the trial court's determination that the State's Statute of Limitations is a bar to their mineral rights claim, and, if so, whether, under State Law, the Statute of Limitations independently bars Petitioners' claim, irrespective of the constitutional adequacy of the tax-sale notice. The Oklahoma Supreme Court specifically held that Petitioners have aban-

doned their rights to attack the judgment of the trial court on the question of the Statute of Limitations, and expressed no opinion on the secondary issue.

1.

PETITIONERS HAVE FAILED TO PRESERVE THE RIGHT TO CHALLENGE THE TRIAL COURT'S DETERMINATION THAT THE STATE'S STATUTE OF LIMITATIONS IS A BAR TO PETITIONERS' MINERAL RIGHTS CLAIM.

The trial court in its judgment of October 27, 1969, specifically held:

> "(2) The Court further finds, orders, adjudges and decrees that from the date of the recording of said Resale Tax Deed, on June 6, 1956, that said Grantees therein, the Cross-Petitioners, R. W. Garrett and R. H. Vaughn, have been in open, continuous, visible, notorious, exclusive and hostile possession of the lands and premises, receiving all of the rents, profits and income therefrom, and that said contesting substituted party defendants are further forever barred and precluded by the Statute of Limitations, from seeking to assert the invalidity of said Resale Tax Deed, as provided by 12 O.S. 1961, Sec. 93(3) and (6)."

Respondents admit the Petition in Error filed by Petitioners contained the two (2) averments of error set forth in their Petition for Writ of Certiorari filed herein, and that their Brief-in-Chief contained the language quoted therein. However, Petitioners' original Brief-in-Chief contained but one Proposition, *viz*: Constitutionally Adequate Notice of the original tax sale and of the Tax Resale was not given Plaintiffs in Error or their predecessors as owners of previously severed mineral rights.

The Supreme Court of Oklahoma, by unanimous decision, citing numerous authorities, has specifically found that such statements in Petitioners' Brief-in-Chief were insufficient to preserve their right to challenge the trial court's judgment as to the issue of the Statute of Limitations, since it was not supported by citation of any authorities, references to the original record or further argument of any kind.

Even now, Petitioners cite no authority in their Petition for Writ of Certiorari in support of the Proposition that the Supreme Court of Oklahoma has erred in its Application of the State Law, and in finding the Petitioners have not preserved their right.

In order to remove any doubt as to whether Respondents have properly preserved their right to assert the Statute of Limitations as a bar to Petitioners' claim, a copy of their Petition for Rehearing and brief before the Court of Appeals of the State of Oklahoma, which was incorporated in their Petition for Certiorari as to the Supreme Court of Oklahoma, and Petitioners' Response thereto, have been shown in the Appendix hereto. In addition thereto, Respondents specifically called to the Court of Appeals' attention on page 7 of their Brief-in-Chief, citing 12 Okla. Stat. 1961 § 93, that to adopt the Proposition advanced by Petitioners would be to hold invalid the applicable Statute of Limitations.

With the exception of *Walker* v. *Hoffman*, 405 P.2d 57 (Okla. 1965), which Respondents contend is clearly not applicable since it involved a Tax Deed issued without the proper statutory notice having been given, and not a Resale

Tax Deed issued in strict compliance with the Statutes, Petitioners cite authority only to the effect that failure to follow State pleading or practice should not bar this Honorable Court from assuming jurisdiction herein. It is respectfully submitted that the issue is whether Petitioners raised, at all, the question of the invalidity of the Statute of Limitations in the state court. The record is clear such was not the case, and thus it was not considered by the Oklahoma Supreme Court.

The Petitioners having failed to assert the invalidity of the Statute of Limitations on any federal ground, or to preserve such right, it is submitted this Honorable Court is now without jurisdiction to review the same. *Wilson* v. *Cook*, 327 U.S. 474, 66 S.Ct. 663, 90 L.Ed. 793.

The opinion by the Court of Appeals, Division 2, of the State of Oklahoma, negates Petitioners' contention they preserved their attack on the invalidity of the Statute of Limitations in their Brief-in-Chief or otherwise. Justice Brightmire in the first paragraph of his opinion stated:

> "The *single question* presented by the Appeal is whether Seminole County deprived Appellants of Fourteenth Amendment due process of law by failing to give them adequate notice of delinquent tax sale proceedings affecting several mineral interests they owned under a certain forty acres of land in Seminole County, Oklahoma." (Emphasis supplied.)

In lieu of the single issue considered by the Court of Appeals, the Petitioners now advance four. Only two of these were presented to this Honorable Court by Petitioners' Brief of May 1973, in *Mary Louise Green Paschall,*

et al. v. *Christie-Stewart, Inc., et al.*, 414 U.S. 100, 94 S.Ct. 313, 38 L.Ed.2d 298.

It is further noted that Petitioners' challenge of the Statute of Limitations, if any, was not based upon any federal grounds, but solely upon the contention Respondents had not taken possession of their mineral interest and thus the Statute had not run. No contention was made that by reason of the alleged constitutional insufficiency of the Tax-sale Notice, the Statute of Limitations would not apply. It is, therefore, difficult to see how this Honorable Court can review an issue not presented for decision to the Supreme Court of the State of Oklahoma, nor passed upon by such Court.

2.

PETITIONERS, UNDER STATE LAW, ARE INDEPENDENTLY BARRED BY THE STATUTE OF LIMITATIONS.

Without apparent consideration to the adverse effect that would result to vested Resale Tax titles in Oklahoma or to the innocent purchasers of such titles, Petitioners now seek to advance the Proposition that the alleged lack of constitutionally valid notice would preclude the running of the Statute of Limitations. The adoption of such a Proposition would not only serve to overrule much of the present authority on the subject in Oklahoma, but would expose every owner of real property within the State, be it surface or mineral interest, to the potential loss of his property, if his title is based upon a Tax Sale.

Petitioners, in order to advance their theory, now attack the constitutionality of the provisions of 68 Okla. Stat.

§ 432(f), now 68 Okla. Stat. § 24335, which has provided since 1910 that the Grantee in a Resale Tax Deed shall be vested with an absolute and perfect title in fee simple to the real property covered thereby. As early as 1914, the Oklahoma Supreme Court held in *Price* v. *Salisbury*, 41 Okla. 416, 138 Pac. 1024, that a Resale Deed vests in the grantee an absolute fee-simple title.

In *Jenkins* v. *Fredericks*, 208 Okla. 583, 257 P.2d 1058, the Oklahoma Supreme Court, citing numerous previous authorities held: "That the Resale Tax Deed vests in the grantee an absolute and perfect title in fee simple to said real estate as against the owner of the mineral rights." In 1966, the Court in *Sautbine* v. *Keller*, Okla., 423 P.2d 477, affirmed the rule stating:

> "In these cases we held the Resale Tax Deed vest an absolute, fee simple title in the holder, even as against the owner of severed minerals, and possession thereunder for the prescribed period bars any claim by the prior mineral owner. Jenkins v. Frederick, 208 Okl. 583, 257 P.2d 1058.
>
> "A claim of title based upon a Resale Tax Deed is notice to the world that the owner in possession thereunder claims a new and absolute fee simple title."

The Court in the *Jenkins* case, *supra*, discussed at length the legislative intent of 12 Okla. Stat. § 93. In reversing the trial court, the Court stated:

> "Clearly the Legislature of 1949 intended that there shall be a limit of time within which deeds of the three classes mentioned in subsec. (6) can be attacked and that unless such actions were commenced within the designated period the right of each attack is lost. The Statute was designed to free one who is not in possession to begin his action for recovery of his interest in the real property or to determine an interest adverse within the specified time or lose his right to attack the deed in question. * * * When the Legislature in its 1949 Amendment lengthened the period of limitation to five years and specifically provided that the periods of limitation in paragraphs (1), (2) and (3) should be fully operative regardless of whether the deed or judgment *were based on proceedings that were void or voidable for any reason*, it is clear that it was intended to establish a uniformity of application of the prescribed Limitations in all of the three designated classes of actions." (Emphasis supplied.)

The undisputed facts of the present case show that Respondents obtained a Resale Tax Deed to the real property involved, issued in strict accordance with the Statutes then in force and effect, dated May 17, 1956, and filed for record June 6, 1956, in Book 890, page 577, of the public records of Seminole County, Oklahoma; that they thereupon took possession of the property and have remained in open, continuous, visible, notorious, exclusive and hostile possession since that time; that the Cross-Petition of the Petitioners attacking said Resale Tax Deed was not filed until March 9, 1965, some 8 years, 10 months, after the deed had been recorded.

Petitioners now argue not only a failure of Due Process, but a denial of equal protection of the law under the Constitution of the United States, an issue not heretofore raised before this Court. Most of the authorities cited by Petitioners deal with the Proposition that possession is an essential element to the running of the Statute of Limita-

tions. With this, we generally agree. What Petitioners fail to recognize is that when the Resale Tax Deed was issued pursuant to the required statutory notice, it vested Respondents with a virgin absolute fee simple title including possession of the minerals, *Jenkins* v. *Frederick, supra; Sautbine* v. *Keller, supra,* and thus commenced the running of the Statute of Limitations.

Respondents can accept and agree with the Proposition that the failure to give the required statutory notice coupled with a failure to take possession would not put in motion the Statute of Limitations. We cannot agree, however, with the Proposition that although the proper statutory required notice was given, a subsequent determination, after the Statute had run, that such notice was not constitutionally valid would preclude the running of the Statute of Limitations. To embrace this theory would be to prohibit any citizen, lawyer or Judge from relying upon any statutory required notice until the same had been declared constitutionally sound by the Supreme Court of the United States.

The Constitution of the United States, although written, is a living document. Its words are subject to judicial interpretation. Rights thereunder may be broadened or limited through changes in man's concepts of fair play and justice. Most of the currently accepted and required procedures in the areas of Civil and Criminal due process and of equal protection of the law have evolved within the past decade, having lain dormant and unrecognized until invoked by judicial Decree. To adopt Petitioners' position would be to restrict and limit the very judicial process to

which Petitioners turn for relief. Would *Mullane* v. *Central Hanover Bank & Trust Company,* 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865, and all of the subsequent cases upon which Petitioners rely have been so decided, if this Honorable Court knew its decision would result in the divestiture of all vested property rights acquired by any citizen, who in good faith, relied upon the prescribed statutory notice? We think not.

The Oklahoma Legislature, whether right or wrong, has provided by Statute that the purchaser at a tax resale shall be vested with an absolute and perfect title in fee simple (68 O.S. § 432f). Petitioners now suggest that such an act is unconstitutional and beyond the power of the Legislature. Clearly this issue, if there is one, has not been properly preserved by the Petitioners and should not be considered by the Court.

Petitioners cite, in support of the Proposition that lack of a constitutionally valid notice precludes the running of the Statute of Limitations, numerous authorities heretofore presented to this Court in its previous consideration of this case, and contend that they clearly support said position. In its opinion, remanding this cause, the Court expressly stated in footnote 4 as follows:

> "Whether the alleged lack of constitutionally valid notice would preclude the running of the Statute of Limitations for an adverse land claim is a question that has not been presented to this Court or to the Oklahoma Courts below. *C. F. Schroeder* v. *City of New York,* 371 U.S. 208, 213-214, 83 S.Ct. 279, 282, 283, 9 L.Ed.2d 255, 259, 260 (1962). We intimate no view on this issue."

It seems clear therefore, that the cases cited by Petitioners do not in fact support their Proposition.

The Court's attention is invited to the fact that in each of the cases cited by Petitioners, *City of New York* v. *NY, NH & HRR*, 344 U.S. 293, 73 S.Ct. 299, 97 L.Ed. 333 (1953); *Covey* v. *Town of Somers*, 351 U.S. 141, 76 S.Ct. 724, 100 L.Ed. 1021 (1956); *Walker* v. *City of Hutchinson*, 352 U.S. 112, 1 L.Ed.2d 178, 77 S.Ct. 200 (1956); *Wisconsin E.P. Co.* v. *City of Milwaukee*, 352 U.S. 948, 77 S.Ct. 324, 1 L.Ed.2d 241 (1956), and *Schroeder* v. *City of New York*, 371 U.S. 208, 9 L.Ed.2d 255, 83 S.Ct. 279, 88 A.L.R.2d 1398 (1962), the rights of third parties who had relied upon the notice given in order to secure a vested interest were not apparently involved.

The *City of New York* case, *supra*, involved a creditor's claim in Bankruptcy and its lien against the real property of the bankrupt. Although it appears title to the real property might have been transferred to a newly organized company, jurisdiction to construe the decree was reserved by the court. Thus the rights of an innocent third party were not directly involved. The case turned on the fact that the statutory notice required was not given and that the substituted publication notice was not sufficient. No issue directly involving the Statute of Limitations was considered by the court.

The *Covey* case, supra, could not have arisen in Oklahoma since our Statute, 68 Okla. Stat. § 24335, expressly provides that persons under legal disability shall have one year after removal of such disability within which to redeem said real estate. Further, the defendant was the Town

of Somers, the taxing authority who had taken the property, and not an innocent third party who had purchased the property pursuant to a public sale. The precise issue of the Statute of Limitations again was not before the court. It is interesting to note that in Mr. Justice Frankfurter's portion of the opinion, while speculating on why the lower court had so held, he concluded that it might have been because of the Statute of Limitations. He then stated, "Since the State has power to put a time limit on the reopening of the judgment of foreclosure under that provision, such action is not a violation of the Fourteenth Amendment."

The *Walker* and *Wisconsin E.P. Co.* cases likewise did not involve the vested rights of innocent third parties. The parties to the suits were in both cases the municipal corporations and the owner. Title was not an issue.

Schroeder v. *City of New York, supra*, appears at first glance to be somewhat in point. A close examination of the opinion, however, reveals that the question of the Statute of Limitations was never an issue properly before the Court. The Court speaking of the apparent three-year period of limitation within which Appellant had to file their claim stated: "There was no such allegation in the pleadings, upon which the case was decided by the Trial Court." Again the rights of an innocent third party were not involved to be protected by the Court.

The trial court record of this case consists only of certain stipulations by the parties and the testimony of Mr. R. H. Vaughn. It was stipulated that the Resale Tax Deed of the Respondents was dated May 17, 1956, recorded in

Book 1045, page 218, of the public records on June 7, 1956; that at the time of the issuance of the deed, and the years for which the sale was had for delinquent taxes, there was no oil and gas production; that Respondents had paid all ad valorem taxes on the property since 1956. Mr. Vaughn testified that he and his co-tenant, Mr. Garrett had been in continuous possession of the property since June 7, 1956. Based upon this undisputed record the trial court, applying the Statutes and prevailing case law of Oklahoma, expressly and correctly found Petitioners were barred by the Statute of Limitations.

This Honorable Court has consistently held the States may constitutionally impose Statute of Limitations upon claimants in order to avoid the litigation of stale and vexatious claims. *Vance* v. *Vance,* 108 U.S. 514, 2 S.Ct. 854, 27 L.Ed. 808; *Atchafalaya Land Co.* v. *F. B. Williams Cypress Co.,* 258 U.S. 190, 42 S.Ct. 284, 66 L.Ed. 559; *Kavanaugh* v. *Noble,* 332 U.S. 535, 68 S.Ct. 235, 92 L.Ed. 150. The nature of the claim to be barred, irrespective of any constitutional right involved, does not appear to be the test to the validity thereof, but only whether it allows a reasonable time after its enactment for the assertion of an existing right.

3.

PETITIONERS WERE GIVEN NOTICE OF THE TAX SALE PROCEEDINGS, WHICH DEPRIVED THEM OF THEIR PROPERTY.

The issue previously briefed and argued before this Honorable Court in Case No. 72-922, was not whether notice was given, since the undisputed facts are that a publication notice was given, but whether such notice was adequate in view of the Rule announced in *Mullane* and the subsequent cases cited by Petitioners.

We invite the Court's attention to the fact that Petitioners introduced no evidence or offered any evidence in the trial court as to whether the names of Petitioners were in fact known to the County Treasurer or were very easily ascertainable from the public records then available. It is submitted that the total lack of such evidence would preclude the Court from now seeking to apply the principles of *Mullane.*

4.

THE STATE COURT HAS NOT DECIDED FEDERAL QUESTIONS OF SUBSTANCE NOT HERETOFORE DETERMINED BY THIS COURT NOR HAS IT DECIDED SUCH QUESTIONS IN A WAY NOT IN ACCORD WITH OTHER APPLICABLE DECISIONS OF THIS COURT.

The opinion of the Oklahoma Supreme Court of November 5, 1974, which Petitioners seek to have reviewed, clearly decided no Federal Questions of substance. The essence of such opinion was to find that Petitioners had failed to preserve their right to challenge the trial court's holding that their claim was barred by the Statute of Limitations.

The Court made specific reference to the trial court's determination that (1) under 12 O.S. 1961 § 93 (3) and (6) that the five-year Statute of Limitations had run against Petitioners and (2) that the Resale Tax Deed was validly issued under 68 O.S. 1961 § 432 and existing Tax Sale procedures; the Court then reversed the judgment of the Court of Appeals, and affirmed the judgment of the trial court for the reasons hereinabove stated. It would, therefore, appear the decision did not involve any Federal Question of substance, nor was it decided in a way not in accord with other applicable decisions of this Honorable Court.

The holding by the Supreme Court of the State of Oklahoma concerned matters of State Law and amounted at most to an alleged erroneous construction of the application of the State Statute of Limitations to Petitioners' claim, which this Honorable Court is without jurisdiction to review. *Neblett* v. *Carpenter*, 305 U.S. 297, 59 S.Ct. 170, 83 L.Ed. 182.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that Petitioners' Petition for Writ of Certiorari be denied.

Respectfully submitted,

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Counsel for Respondents

May, 1976

APPENDIX

FILED
COURT OF APPEALS
STATE OF OKLAHOMA
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ANDY PAYNE
CLERK

IN THE COURT OF APPEALS OF
THE STATE OF OKLAHOMA,
DIVISION NO. 2

Mary Louise Green Paschall, individually and as Executrix of the Estate of John N. Paschall, Deceased, et al, Plaintiffs in Error,	)	
vs.	)	NO. 43,907
R. H. Vaughn and R. W. Garrett, Defendants in Error.	)	

PETITION FOR REHEARING

Come now, R. H. Vaughn and R. W. Garrett, Defendants in Error, and respectfully represent to the Court that on the 6th day of December, 1971, a Decree and Judgment was rendered by this Court in said cause modifying the judgment of the Trial Court and affirming said judgment as modified.

1. That said decision is in conflict with the Rules on Practice and Procedure in the Court of Appeals, Rule 3.2, and the Objectives of the Supreme Court of the State of Oklahoma, to which the attention of the Court has not been called in this case, either in Brief or oral argument, or which has been overlooked by the Court, to-wit:

(a) That said decision was rendered while a Motion for Recall and Retention of Case in Supreme Court was pending and not disposed of by the Supreme Court.

(b) That said decision results in declaring unconstitutional certain Oklahoma Statutes dealing with

Notice in the Tax Sale of Real Property, but cannot be considered as precedent or authority to be followed by the lower Courts of the State of Oklahoma.

(c) That said decision results in the overruling of controlling precedent in the State of Oklahoma.

(d) That said decision presented a question of constitutional or public law and should not, therefore, have been determined by the Court of Appeals.

2. That said decision overlooked questions decisive of the case, and duly submitted by Counsel, to-wit:

(a) That the Court failed to apply the provisions of Title 12, Oklahoma Statutes Section 93(3), which prohibits the bringing of an action for the recovery of real property sold for taxes, within five (5) years after the date of the recording of the Tax Deed.

(b) That the Court failed to apply the provisions of Title 68, Oklahoma Statutes Section 24344, which requires that a tender of all taxes, penalties, interest and costs must be made by a party seeking to redeem and set aside a Tax Deed.

(c) That the Court failed to apply the principal followed by the Supreme Court in *Bomford vs. Socony Mobil Oil Company*, 440 P2d 713 (1969) which will result in the upsetting of settled titles within the State of Oklahoma.

WHEREFORE, Defendants in error pray that a rehearing of said cause may be granted by your Honorable Court.

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IN THE COURT OF APPEALS OF
THE STATE OF OKLAHOMA,
DIVISION NO. 2

Mary Louise Green Paschall, individually and as Executrix of the Estate of John N. Paschall, Deceased, et al, Plaintiffs in Error,	)	
vs.	)	NO. 43,907
R. H. Vaughn and R. W. Garrett, Defendants in Error.	)	

BRIEF IN SUPPORT OF PETITION FOR REHEARING

1. The above cause was apparently assigned to the Court of Appeals Division No. 2, by Order of the Chief Judge of the Supreme Court on November 12, 1971. On November 18, 1971, a Motion for Recall and Retention of Case in the Supreme Court was filed by the Plaintiffs in Error herein, which motion was pending and undisposed of at the time the decision was rendered by this Honorable Court. It is respectfully submitted that until said Motion was disposed of by the Supreme Court, no decision should have been rendered in the above cause and that said opinion should be withdrawn until such time as the jurisdiction of this Court to hear the same has been determined.

Rule 3.2 (a) of the Rules on Practice and Procedure in the Court of Appeals and on Certiorari to that Court as promulgated by the Supreme Court states:

"(a) The objective of this Court is to assign to the Court of Appeals primarily those cases which *do not*:

(1) present a matter of first impression;

(2) seek the overruling of controlling precedent; or

(3) present a question of constitutional or public law.

(Emphasis Supplied "

Clearly the decision of this Court is manifestly contrary to the express objectives of the Supreme Court as set forth in (2) and (3) of the above Rule. The decision unquestionably overrules precedent, *Jenkins* v. *Frederick*, 208 Okl. 583, 257 P2d 1058 (1952) and *Cornelius* v. *Jackson*, 201 Okl. 667, 209 P2d 166 (1948) and declares unconstitutional the notice now required by the pertinent Oklahoma Statutes.

Since the decision of this Court is not to be considered as precedent or authority and is not for publication in the official Reporter, such decision may result in a different standard of justice being applied to these Defendants in Error, than will be applied to others under similar circumstances. In order to avoid the application of this double standard of justice, it is respectfully submitted that said decision should be withdrawn and the matter thereafter be assigned to the Supreme Court on request of a majority of the Judges of this division pursuant to Rule 3.2(b) of the Rules on Practice and Procedure in the Court of Appeals.

2. It would appear from the stipulated facts and the record, the Resale Tax Deed in question was issued and recorded in 1956. The present action was not commenced until 1963, more than six (6) years after the deed was recorded.

Title 12, Section 93 (3) of the Oklahoma Statutes provides that actions for the recovery of real property, or for the determination of any adverse right or interest therein, can only be brought within the periods therein prescribed. Sub-section 3 provided that an action for the recovery of real property sold for taxes, must be brought within five (5) years after the date of the recording of the Tax Deed.

The Resale Tax Deed of the Defendants in Error was not void on its face nor was the County without jurisdiction to sell the property. Further, the record reflects that the Defendants in Error were in continuous possession of the real estate since the Deed was issued. Under these circumstances, the Court should have denied recovery based upon the Statute of Limitations. See *Gooding* v. *Edwards*, Okl. 290 P2d 408 (1955) and *Boone* v. *Clayton*, Okl. 269 P2d 980 (1954).

The record further reflects that the Plaintiffs in Error at no time made any tender of the taxes, penalties, interest and costs which had been paid by the Defendants in Error, as required by the provisions of Title 68 Section 24344 of the Oklahoma Statutes. The Plaintiffs in Error were not entitled to present and have determination of their attack on the Resale Deed either in the Trial Court or on appeal by this Court in the absence of such tender. *Knisely* vs. *Board of Trustees of the Town of Skiatook*, 192 Okl. 225, 134 P2d 971 (1943).

The Plaintiffs in Error cite and rely upon in their Reply Brief filed herein, *Bomford* v. *Socony Mobil Oil Company*, Okl. 440 P2d 713 (1960). It would appear, however, that this Court has failed to apply to its decision the fundamental principal set forth by the Supreme Court therein. The Supreme Court in its final paragraph citing authorities, stated:

> "Mindful of our duty to guard against any attempt to upset settled titles by imposition of new requirements which did not exist before, we declare that all procedural modifications enunciated herein shall not be construed as invalidating the publication process in this case or in any case in which the Trial Court's judgment shall have been rendered before this opinion becomes final."

The decision of this Court clearly does not follow or apply the above principal and will, if allowed to stand,

upset all titles which were secured by Resale Tax Deed issued following the prescribed statutory procedure.

It is, therefore, respectfully submitted that Defendants in Error Petition for Rehearing should be granted and the decision of the Court rendered on December 6, 1971, should be withdrawn and the cause assigned to the Supreme Court for decision or upon further consideration, the decision of the Trial Court should be affirmed.

ELLIOTT, WOODARD & ROLSTON

BY

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ATTORNEY FOR DEFENDANTS IN ERROR

300 LOCAL FEDERAL BUILDING

OKLAHOMA CITY, OKLAHOMA

IN THE COURT OF APPEALS OF
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R. H. Vaughn and R. W. Garrett, Defendants in Error.	)	

RESPONSE TO PETITION FOR REHEARING

Come now, Mary Louise Green Paschall, individually and as Executrix of the Estate of John N. Paschall, deceased, and Jan Paschal Harden, John N. Paschall, Jr., and

H. Grady Ross, and Zelda Danna Paschall, individually and as Executrix of the Estate of Walter B. Paschall, Jr., deceased, Plaintiffs in Error, in response to the Petition for Rehearing filed herein by Defendants in Error, and respectfully show the Court that the matters set forth in such Petition for Rehearing are either moot, or were given adequate consideration and argument in prior pleadings and briefs, or are without legal merit. In support thereof the attached brief is tendered for the consideration of the Court.

Accordingly, Plaintiffs in Error pray that the rehearing requested by Defendants in Error be denied.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 7th day of January, 1972, he caused a copy of the foregoing Response to Petition for Rehearing and supporting Brief to be mailed, postage prepaid, to Elliott, Woodard & Rolston, Attention: Joe S. Rolston III, Suite 300, Local Federal Building, Oklahoma City, Oklahoma 73102.

s/ William J. Legg
William J. Legg

IN THE COURT OF APPEALS OF
THE STATE OF OKLAHOMA,
DIVISION NO. 2

Mary Louise Green Paschall, individually and as Executrix of the Estate of John N. Paschall, Deceased, et al, Plaintiffs in Error,	)	
vs.	)	NO. 43,907
R. H. Vaughn and R. W. Garrett, Defendants in Error.	)	

BRIEF IN SUPPORT OF RESPONSE TO
PETITION FOR REHEARING

Recognizing that Plaintiffs in Error had on file in the Supreme Court of Oklahoma at the time of the decision of this case by this Court, their Motion for Recall and Retention of Case in the Supreme Court, it should be noted that Defendants in Error made no effort to support such Motion prior to the decision. Regardless of that however, the Supreme Court on December 20, 1971, issued its Order denying the Motion for Recall and Retention, reciting that the Motion was untimely filed and moot. It is submitted therefore that it is untimely now for the Defendants in Error to suggest that the opinion of this Court be withdrawn, since the Motion in the Supreme Court had been denied. The point is moot.

Defendants in Error have additionally raised three other arguments for setting aside this Court's opinion of December 6, 1971, each of which were touched upon in prior pleadings but not pursued seriously before:

1. Defendants in Error have suggested that the defense of their property rights by Plaintiffs in Error was barred by Title 12, Section 93(3). This argument is based upon a

literal reading of the section which requires the recordation of the tax deed for a period in excess of five (5) years. However, the Supreme Court of Oklahoma has repeatedly held that implied therein is a further requirement that actual possession be taken and held adversely in the legal sense during that same five (5) year period, constructive possession not being sufficient; *Sarkeys* vs. *Scott*, 269 P.2d 779. In *Myers* vs. *Parkins*, 412 P.2d 136, it was held that:

> "Where ownership of the surface and of the mineral rights have been severed, the only way the Statute of Limitations can be asserted against the owner of the mineral rights or estate is for the owner of the surface estate or some other person to take actual possession of the minerals by opening and operating mines for the statutory period."

The transcript of the trial proceedings clearly establishes that no operations for drilling or producing minerals occurred during the period after the recordation of the tax deed and before the granting of the oil and gas lease to Christie-Stewart, Inc., who also took a similar oil and gas lease from Plaintiffs in Error at approximately the same time. No other oil and gas leases were ever granted by Defendants in Error, according to testimony. Under the authority cited above, it can only be held that Defendants in Error wholly failed to take possession of the minerals under the land here being considered and therefore cannot rely upon 12 O.S. §93(3) as perfecting their rights to the minerals by prescription. *Gooding* vs. *Edwards*, 290 P.2d 408, which was based upon and cites *Boone* vs. *Claxton*, 269 P.2d 980, both of which cases are cited by Defendants in Error, was specifically overruled on this exact point in *Walker* vs. *Hoffman*, 405 P.2d 57 (pg. 60).

2. Defendants in Error have raised the technical point that Plaintiffs in Error "at no time made any tender of the taxes, penalties, interest and costs which had been paid by the Defendants in Error, as required by the provisions

of Title 68 Section 24344 of the Oklahoma Statutes." First, it will be observed that Defendants in Error purchased this tax title to forty acres of Seminole County land and after this present decision they still own forty acres of Seminole County land. This Court's decision merely means that they did not, thereby, obtain title to the minerals under the land and consequently they have lost nothing by the non-tender. Second, under the law of Oklahoma, the surface owner has the full duty of paying ad valorem tax, not the mineral owner; *Myers* vs. *Parkins*, 412 P.2d 136. Since Plaintiffs in Error are severed mineral interest owners, there was no amount of taxes due from them, either before or after the tax sale. Consequently, the statute cited by Defendants in Error, §24344, to require a tender, is inapplicable because its language is as follows:

> "To defeat the deed, the person desiring to set the same aside and recover the land . . . must, when his action to set aside the tax deed is brought, or a defense to a recovery of possession is pleaded, tender in open court for the use of the holder of the tax deed, all taxes, penalties, interests and costs, *which the party seeking to redeem would be bound to pay* if he was then redeeming the land from tax sale. . . ." (emphasis supplied)

Of course, Plaintiffs in Error are not seeking to "redeem" in the technical sense, but are seeking merely to protect their property rights from a claim asserted by reason of a tax deed. Even if they were considered as attempting to redeem, this statute requires them to tender only that which they would be bound to pay otherwise. Since mineral owners are not bound to pay taxes, and since these mineral owners are not redeeming, the tender requirement is not applicable. If required, Plaintiffs in Error have no objection to paying such taxes, penalties, interest and costs, to the extent of any redemption which they are found to have made, and they hereby make such tender; however, they

ask that the Court determine the amount thereof, keeping in mind that these are mineral owners without duty to pay ad valorem taxes, that they will only be redeeming such mineral rights (not the surface estate), and that Defendants in Error will still retain the full fee simple title to the land less and except only the oil and gas and other minerals thereunder. The impracticality of exactly determining the amount, we believe, illustrates the impracticality of requiring such a tender in these circumstances.

3. Defendants in Error have complained that the decision of this case by this Court does not apply the principle followed in the case of *Bomford* vs. *Socony Mobil Oil Company*, 440 P.2d 713, concerning the upsetting of settled titles within the State of Oklahoma. The quotation in their Brief deals with the imposition of new requirements for showing compliance with procedural due process. The Bomford opinion had affirmed the lower court that due process by publication service in that case had fulfilled all requirements. The Supreme Court went further, however, and in effect laid down procedural requirements for future cases, but stated in the quoted paragraph that these new procedural rules would not apply to prior adjudications. This was not saying that the constitutional requirements of due process in any case would not be fully enforced even if purported titles and claims would be upset. The Constitution is the law of the land regardless of the fact that certain claims may be upset by its enforcement. The Bomford opinion specifically recognizes the U.S. Supreme Court decisions commencing with *Mullane* vs. *Central Hanover B. & T. Co.*, supra, stating "Oklahoma has long recognized the Mullane doctrine." In the instant case, this Court has simply enforced the Constitution, and it should not limit the effect of its ruling on the possibility that some claimants to other people's property might be upset. The Bomford case protected *judgments* of courts rendered before that opinion became final: the opinion in the instant case affects

tax sales and will have no upsetting effect on titles perfected by judgments. The fact that Resale Tax Deeds may have been issued following the prescribed statutory procedure should have no validating influence on them if that statutory procedure violates the Constitution. If that argument were sound, State legislatures could enact any law they desired, even though unconstitutional, and there would be no constitutional protection available, because striking down the unconstitutional law would upset interests which might be claimed thereunder. What happens to the Constitution then? Where is constitutional protection in such circumstances?

* * * * * *

We have attempted to answer each of the points raised in the Petition for Rehearing, in the belief that this case is important and should have full consideration of the various issues involved. However, we suggest that the overriding issue is the Constitutional question represented by the Mullane decision of the U.S. Supreme Court. That was the question on which the case was submitted and with which the appellate briefs dealt almost exclusively. At this late stage, new attorneys have entered the case bringing up subsidiary questions not previously pursued seriously. We urge the Court to stand upon its well-written, well-reasoned opinion dealing with the central issue of this case, and not permit these minor and belated matters to obscure the true significance of the Court's holding.

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CERTIFICATE OF SERVICE

I hereby certify that the following, who are all of the parties required by law to be served in the above case, were this day each mailed three copies of the foregoing Brief of Respondents in Opposition to Petition for Writ of Certiorari, postage prepaid:

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DATED this ... day of May, 1976.

JOE S. ROLSTON III